No. 17-1672

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANDRE RALPH HAYMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred in holding "unconstitutional and unenforceable" the portions of 18 U.S.C. 3583(k) that required the district court to revoke respondent's ten-year term of supervised release that was imposed for his conviction for possessing child pornography, and to impose five years of reimprisonment, following its finding by a preponderance of the evidence that respondent violated the conditions of his release by again possessing child pornography.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 869 F.3d 1153. A prior opinion of the court of appeals is reported at 672 F.3d 948. The opinion of the district court (Pet. App. 35a-69a) is not published in the Federal Supplement but is available at 2016 WL 4094886.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2017. A petition for rehearing was denied on January 16, 2018 (Pet. App. 70a). On April 4, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including May 16, 2018. On May 3, 2018, Justice Sotomayor further extended the time to and including June 15, 2018, and the petition was filed on that date. The petition was granted on October 26, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be * * * deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Section 3583(k) of Title 18 provides:

> Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

18 U.S.C. 3583(k) (Supp. V 2017).[1]

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[1] Unless otherwise indicated, all references to 18 U.S.C. 3583 and other federal statutes are to the 2012 edition of the United States Code, with amendments contained in the 2017 Supplement V. The current versions of those statutes are identical in all material respects to the versions in force at the time of respondent's sentencing.

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Oklahoma, respondent was convicted on one count of possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Pet. App. 2a. The district court sentenced him to 38 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* The court of appeals affirmed, 672 F.3d 948, and this Court denied review, 567 U.S. 923. The district court subsequently revoked respondent's supervised release and ordered five years of reimprisonment, to be followed by five years of supervised release. Pet. App. 35a-69a. The court of appeals affirmed the revocation of supervised release but vacated the order of reimprisonment and remanded. *Id.* at 1a-28a.

A. Respondent's Offense Conduct And Jury Trial

In 2007, an undercover federal agent "caught [respondent] sharing child pornography files on * * * a peer-to-peer sharing network." Pet. App. 37a. Agents subsequently "located seventy files containing child pornography" on respondent's computer. *Ibid.* Respondent, who was studying computer programming at a local community college, "admitted" that he was "addicted to child pornography"; that he "had been accessing child pornography since 2006"; that he "searched the Internet regularly for child pornography"; and that he "deleted the images after he viewed them by reformatting his hard drive and reinstalling his Windows operating system." *Ibid.*; see 672 F.3d at 956 (noting that

respondent "admitted to frequently searching for and downloading child pornography").

A grand jury indicted respondent for possession and attempted possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). See 672 F.3d at 951. Respondent proceeded to trial. The government selected seven sexually explicit images of children found on respondent's computer as the basis for its case at trial. *Ibid.* A federal agent testified that the "seven charged images are part of a larger series of photographs" known to the National Center for Missing and Exploited Children "as the 'Brad and Bry' series." *Id.* at 953. The images depict sexually explicit conduct involving boys who were "between twelve and fourteen years old when the photos were taken." *Ibid.* The jury found respondent guilty. Pet. App. 37a.

B. Respondent's Sentence

Respondent's conviction following a jury trial exposed him to a sentence containing multiple component parts: under 18 U.S.C. 2252(b)(2), respondent could "be fined * * * or imprisoned not more than 10 years, or both," and under 18 U.S.C. 3583(k), the district court was required to impose a supervised-release term of at least five years. The district court imposed a sentence of 38 months of imprisonment, to be followed by ten years of supervised release. Pet. App. 37a. The supervised-release portion of the sentence, as explained further below, was subject to "numerous conditions," the violation of which could result in reimprisonment. *Ibid.*

1. Imposition of supervised release

Established by Congress in 1984, supervised release is the principal "form of postconfinement monitoring" for defendants who are convicted of federal crimes.

Johnson v. *United States*, 529 U.S. 694, 697 (2000). Like the federal parole system it replaced, supervised release provides defendants with a form of conditional liberty by allowing them to provisionally serve "part of the[ir] sentence" out of prison, subject to revocation and reimprisonment if they violate the conditions of their release. 18 U.S.C. 3583(a); see *Johnson*, 529 U.S. at 711.

A district court generally has discretion both as to whether to impose a term of supervised release and as to the length of the term it imposes, within limits corresponding to the severity of the offense of conviction. 18 U.S.C. 3583(a) and (b); see Sentencing Guidelines §§ 5D1.1, 5D1.2. In making those determinations, courts must consider the same factors that govern imposition of the other parts of a sentence, see 18 U.S.C. 3553(a), except for the need for the sentence to provide "just punishment," 18 U.S.C. 3553(a)(2)(A); see 18 U.S.C. 3583(c).

In some cases, a term of supervised release "is required by statute," and a court "shall" impose it. 18 U.S.C. 3583(a). For example, a court is required by statute to impose terms of supervised release for certain domestic-violence, terrorism, and drug-trafficking crimes. See 18 U.S.C. 3583(a) and (j), 21 U.S.C. 841(b), 960(b). Some statutes require courts to impose a minimum term of supervised release. See, *e.g.*, 21 U.S.C. 841(b), 960(b) (requiring a minimum term of five years for certain drug-trafficking crimes). And some statutes authorize terms of supervised release up to life. See, *e.g.*, *ibid.*; 18 U.S.C. 3583(j) (authorizing life term for certain terrorism offenses).

Of central relevance here, 18 U.S.C. 3583(k) requires a district court to impose a term of supervised release of five years to life for conviction of certain specified

kidnapping or sex offenses—primarily, offenses that victimize minors—including the child-pornography offense for which respondent was convicted.[2] Congress added that requirement as part of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. I, § 101, 117 Stat. 651-652. The requirement reflects the shared judgment of Congress and the Executive Branch that many sex offenders have "deep-seated aberrant sexual disorders" that require "long-term—and in some cases, lifelong—monitoring and oversight" to protect the public. H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 49-50 (2003); see George W. Bush, *Remarks on Signing the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*, 1 Pub. Papers 398 (Apr. 30, 2003) ("This law carries forward a fundamental responsibility of public officials at every level of government to do everything we can to protect the most vulnerable citizens from dangerous offenders who prey on them."); see also

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[2] Specifically, Section 3583(k) requires supervised release for an offense under 18 U.S.C. 1201 (kidnapping) involving a minor victim, and for any offense under Sections 1591 (sex trafficking of children or by force, fraud, or coercion), 1594(c) (conspiracy to commit sex trafficking of children or by force, fraud, or coercion), 2241 (aggravated sexual abuse), 2242 (sexual abuse), 2243 (sexual abuse of a minor or ward), 2244 (abusive sexual contact), 2245 (murder during the commission of certain sex crimes), 2250 (failure to register as a sex offender), 2251 (sexual exploitation of children), 2251A (selling or buying of children), 2252 (child pornography), 2252A (child pornography), 2260 (extraterritorial child pornography), 2421 (transportation of an individual with intent that the individual engage in prostitution or sex crimes), 2422 (coercion and enticement), 2423 (transportation and travel offenses involving child sex crimes), or 2425 (transmission of information about a minor to entice a sex crime).

Sentencing Guidelines § 5D1.2(b) (recommending the "statutory maximum term of supervised release" when "the instant offense of conviction is a sex offense").

The district court in respondent's case imposed a ten-year, rather than the statutory-minimum five-year, term of supervised release as part of the sentence for his child-pornography conviction. Pet. App. 2a. The court explained that a "ten-year term of supervised release is appropriate based on the nature of the offense and [respondent's] need for treatment and monitoring." 6/10/10 Sent. Tr. 49.

2. Conditions of supervised release

When a court orders supervised release, it also specifies conditions for that release, 18 U.S.C. 3583(d), the violation of which may result in the revocation of supervised release and reimprisonment, see, *e.g.*, 18 U.S.C. 3583(e)(3). Among other mandatory conditions, every sentence including a term of supervised release must order, "as an explicit condition," that "the defendant not commit another Federal, State, or local crime during the term of supervision" and that the defendant "not unlawfully possess a controlled substance." 18 U.S.C. 3583(d). Respondent's child-pornography offense triggered a further requirement that the court "order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act [(SORNA) 34 U.S.C. 20901 *et seq.* (formerly codified at 42 U.S.C. 16901 *et seq.*)] that the person comply with the requirements of that Act." *Ibid.*; see 34 U.S.C. 20911(1) and (5)(A)(iii), 20913(a).

A sentencing court may also impose "any other condition it considers to be appropriate," including "any condition set forth as a discretionary condition of pro-

bation in" 18 U.S.C. 3563(b), so long as the condition satisfies certain statutory limitations. 18 U.S.C. 3583(d); see Sentencing Guidelines § 5D1.3. In the case of a defendant who, like respondent, "is a felon and required to register under" SORNA, the court may order "that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant," by a "probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person." 18 U.S.C. 3583(d); see Sentencing Guidelines § 5D1.3(d)(7) (outlining advisory conditions for sex offenders).

The district court in respondent's case specified that his supervised release would be subject to "numerous conditions." Pet. App. 37a. In addition to the statutorily mandated conditions that respondent not commit another federal, state, or local crime and register as a sex offender under SORNA, the court required respondent to, *inter alia*, participate in sex-offender and mental-health treatment, refrain from unapproved contact with children, "not view or possess any materials * * * depicting and/or describing sexually explicit conduct or child pornography," disclose all internet devices and passwords, install and pay for software allowing monitoring of his computer activity, and submit to searches by his probation officer under terms similar to those described above, 1 C.A. App. 31-32.

In imposing the sentence, the district court read the conditions of supervised release to respondent on the record. 2 C.A. App. 201. Respondent subsequently

"signed those conditions," 3 C.A. App. 38, and acknowledged that he was aware of the consequences for violating them, 2 C.A. App. 184, 214.

3. Consequences for violating the conditions of supervised release

When a defendant completes a prison term and is released back into society, his supervised release is "overseen by the sentencing court," *Johnson*, 529 U.S. at 697, with the Probation Office (an arm of the court) monitoring the defendant's compliance with the supervised-release conditions, 18 U.S.C. 3603(1)-(4); see 18 U.S.C. 3602. Although probation officers work "to aid * * * a person on supervised release" and "to bring about improvements in his conduct and condition," 18 U.S.C. 3603(3), it is inherent in the conditional nature of supervised release that some defendants will "tr[y] liberty and fail[]," *Johnson*, 529 U.S. at 709.

Where a defendant proves to be a "problem case among problem cases," *Johnson*, 529 U.S. at 709, the violation of his supervised-release conditions will result in reimprisonment, which may be followed by further supervised release, see United States Sentencing Comm'n, *Federal Offenders Sentenced to Supervised Release* 4 (July 2010) (noting that one-third of defendants sentenced to supervised release "had their terms revoked and were sent back to prison"). In *Johnson* v. *United States*, *supra*, this Court addressed "postrevocation penalties" following supervised-release violations and explained that they are not punishments for the violations themselves, but are instead attributable "to the original conviction," thereby "avoid[ing]" constitutional difficulties that would have arisen under the former interpretation. 529 U.S. at 700-701.

Under 18 U.S.C. 3583(e)(3), a district court may "revoke a term of supervised release" if the court, pursuant to Federal Rule of Criminal Procedure 32.1, "finds by a preponderance of the evidence that the defendant violated a condition of supervised release." 18 U.S.C. 3583(e)(3). If the court revokes supervised release, it generally may "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision." *Ibid.* The court generally may also require further supervised release after the reimprisonment, subject to certain statutorily specified limits. 18 U.S.C. 3583(h).

In considering whether to revoke supervised release and impose reimprisonment or additional supervised release, courts consider the original offense of conviction along with the nature of the supervised-release violation. Sentencing Guidelines §§ 7B1.3, 7B1.4. Section 3583(e)(3)'s authorization of a term of imprisonment contains an "except[ion]" that sets default limits on the length of reimprisonment, keyed to the defendant's underlying offense of conviction. 18 U.S.C. 3583(e)(3). For example, under Section 3583(e)(3), a defendant convicted of a class C felony "may not be required to serve * * * more than 2 years in prison" for a supervised-release violation. *Ibid.*

Just as some statutes mandate particular terms of supervised release for certain offenses, see p. 5, *supra*, some statutes mandate revocation of supervised release and reimprisonment if the defendant commits certain supervised-release violations. For example, 18 U.S.C. 3583(g) requires a court to revoke the supervised release and order the reimprisonment of a defendant for

certain violations including possession of a controlled substance or a firearm, refusal to comply with drug testing, or testing positive for illegal controlled substances more than three times in one year.

As pertinent here, Section 3583(k) specifies that a district court will revoke supervised release if a defendant who is required to register under SORNA "commits a[] criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [of Title 18], for which imprisonment for a term longer than 1 year can be imposed"—a category of crimes that includes numerous sex offenses involving children. 18 U.S.C. 3583(k). Section 3583(k) further specifies that the district court will require the defendant "to serve a term of imprisonment" that "shall be not less than 5 years," *ibid.*, "without regard to the exception" in Section 3583(e)(3) that would otherwise bear on the length of reimprisonment, *ibid.* Congress added both of those provisions of Section 3583(k) in the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, § 141(e)(2), 120 Stat. 603, which it passed to "protect the public from sex offenders and offenders against children," § 102, 120 Stat. 590; see George W. Bush, *Remarks on Signing the Adam Walsh Child Protection and Safety Act of 2006*, 2 Pub. Papers 1453 (July 27, 2006) (observing that the Adam Walsh Act furthers "a duty to protect our children from exploitation and danger").

In appealing the final judgment entered after his conviction and sentencing, respondent did not challenge the imposition of supervised release under Section 3583(k), the conditions of his supervised release, or any other aspect of his sentence. See 672 F.3d at 953.

C. Respondent's Reimprisonment For Violating The Conditions Of His Supervised Release

Respondent completed his prison term and began his supervised release on April 24, 2013, under the monitoring of a probation officer. Pet. App. 38a. Less than a year later, respondent was indicted in a separate case for failure to register as a sex offender. *Ibid.*; see 18 U.S.C. 2250 (2012). Respondent resolved that charge through a deferred-prosecution agreement. Pet. App. 38a. The Probation Office did not ask the district court to revoke his supervised release at that time.

In January 2015, a new probation officer began monitoring respondent. Pet. App. 38a. She observed that respondent had violated his supervised-release conditions in a number of ways, including failure to attend a number of the sex-offender treatment sessions, "uninstall[ing] monitoring software from his personal computer," "not stay[ing] current on his monitoring software payments," and "fail[ing] to keep installation appointments with the software company." *Ibid.* The officer gave respondent "a strict deadline for compliance" with the computer-monitoring condition, "which he did not meet." *Ibid.* Instead, respondent "bragged * * * that he could outsmart the monitoring software." *Ibid.* Probation officers then conducted a search of respondent's apartment, where they found computers that he had failed to report and a mobile phone that contained images of both adult and child pornography in its memory cache. *Id.* at 37a-45a.

Respondent's probation officer reported to the district court that respondent had committed five violations of his supervised-release conditions: (1) possession of 59 images of child pornography, in violation of the mandatory condition that respondent not commit

another federal, state, or local crime; (2) failure to disclose to the probation office all internet devices respondent possessed, in violation of a special computer restriction; (3) possession of numerous sexually explicit images on his phone, in violation of a special condition that respondent not view or possess pornography; (4) failure to install and pay for computer monitoring software, in violation of a special monitoring condition; and (5) failure to attend sex-offender treatment on 15 occasions, in violation of a special condition that he participate in treatment. Pet. App. 3a; see 1 C.A. App. 36-39.

The district court held an evidentiary hearing on those allegations. See Pet. App. 36a. Respondent was represented by counsel, called an expert witness, presented and cross-examined lay witnesses, and testified before the court. *Ibid.*; see Fed. R. Crim. P. 32.1; 2 C.A. App. 27-225 (revocation hearing transcript). The court found by a preponderance of the evidence that respondent committed each of the charged violations of his supervised-release conditions, although it attributed to him only 13 of the images of child pornography in his phone's cache. Pet. App. 3a, 45a-46a. Of particular relevance here, the court found by a preponderance of the evidence (but explicitly did not find beyond a reasonable doubt) that respondent had violated his supervised-release conditions by knowingly possessing 13 images of child pornography in violation of Section 2252(a)(4)(B). *Id.* at 3a, 45a-68a.

Because respondent was required to register as a sex offender under SORNA and violated the conditions of his supervised release by committing a "criminal offense under chapter" 110 of Title 18 "for which imprisonment for a term longer than 1 year can be imposed,"

18 U.S.C. 3583(k)—namely, knowing possession of child pornography in violation of 18 U.S.C. 2252(a)(4)(B)—the court was required by Section 3583(k) to revoke respondent's supervised release and order him reimprisoned for "not less than 5 years," 18 U.S.C. 3583(k); see Pet. App. 68a. Finding "no factor present that warrant[ed]" a longer period of reimprisonment, 3 C.A. App. 152, the court ordered respondent to return to prison for five years, after which he would serve five years on supervised release, *id.* at 153; see 18 U.S.C. 3583(h).[3]

D. Respondent's Appeal Of His Supervised-Release Revocation And Reimprisonment

The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-28a. The court unanimously rejected respondent's challenge to the sufficiency of the evidence that he knowingly possessed child pornography (although it viewed the case to be "close"), and it affirmed the district court's revocation of his supervised release. *Id.* at 4a-10a, 28a; see *id.* at 29a-31a (Kelly, J., concurring in part and dissenting in part). But a majority of the panel concluded that the case should be remanded for further proceedings in which only Section 3583(e)(3), and not Section 3583(k), would apply to the district court's imposition of consequences for the supervised-release violation. *Id.* at 28a. The majority excised, as "unconstitutional and unenforceable," the final two sentences of Section 3583(k), which require revocation of supervised release and reimprisonment

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[3] The district court noted its "serious concerns about" the requirement that respondent return to prison for at least five years after a revocation decision made "without a jury," but did not address any constitutional questions. Pet. App. 50a-51a.

for at least five years on a finding that a particular type of defendant has violated supervised release by committing conduct corresponding to certain listed crimes. *Ibid.*; see *id.* at 26a-28a.

1. In the majority's view, Section 3583(k) "violates the Fifth and Sixth Amendments" for two reasons: "(1) it strips the sentencing judge of discretion to impose punishment within the statutorily prescribed range," and "(2) it imposes heightened punishment on sex offenders expressly based, not on their original crimes of conviction, but on new conduct for which they have not been convicted by a jury beyond a reasonable doubt." Pet. App. 15a.

As to the first rationale, the court of appeals recognized that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a jury determination of the facts constituting that violation." Pet. App. 17a (citing *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972)). The majority also recognized that this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—which hold that any fact other than a prior conviction "that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt," Pet. App. 15a-16a (quoting *Alleyne*, 570 U.S. at 103)—apply only to "the criminal prosecution" and not to the revocation of supervised release, *id.* at 17a.

The court of appeals concluded, however, that Section 3583(k) "violates the Sixth Amendment" under *United States* v. *Booker*, 543 U.S. 220 (2005), which applied *Apprendi* to the federal Sentencing Guidelines.

Pet. App. 21a. The majority reasoned that "[b]y requiring a mandatory term of reimprisonment, 18 U.S.C. § 3583(k) increases the minimum sentence to which a defendant may be subjected." *Id.* at 20a. The majority noted that "when [respondent] was originally convicted by a jury, the sentencing judge was authorized to impose a term of imprisonment between zero and ten years." *Ibid.* (citing 18 U.S.C. 2252(b)(2)). The court further noted that "[a]fter the judge found, by a preponderance of the evidence" that respondent had violated a condition of his supervised release, Section 3583(k) required respondent to serve "a term of reincarceration of at least five years." *Ibid.* In the majority's view, "[t]his unquestionably increased the mandatory minimum sentence of incarceration to which [respondent] was exposed from no years to five years," thereby "chang[ing] his statutorily prescribed sentencing range" without a jury finding beyond a reasonable doubt. *Id.* at 20a-21a (footnote omitted).

As to the second rationale for its constitutional holding, the court of appeals did not dispute that "committing any crime" in violation of supervised-release conditions imposed following conviction of a class C felony like respondent's could permissibly result in respondent's reimprisonment for up to two years under Section 3583(e)(3). Pet. App. 22a. But the court took the view that Section 3853(k) "impermissibly requires a term of imprisonment based * * * on the commission of a new offense—namely 'any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed.'" *Ibid.* (quoting 18 U.S.C. 3583(k)). The majority reasoned that "[b]y separating [certain] crimes from

other violations, § 3583(k) imposes a heightened penalty" that does not depend on the original offense, and "must be viewed, at least in part, as" imposing "punishment for the subsequent conduct" rather than the original offense. *Id.* at 23a. Viewed in that manner, the court concluded, Section 3583(k) invites the constitutional concerns that this Court avoided in *Johnson* by contruing supervised-release revocation as punishment for the original offense. *Id.* at 21a-22a.

Turning to "the appropriate remedy" to address the constitutional violation it perceived, the majority recognized that it "must 'refrain from invalidating more of the statute than is necessary.'" Pet. App. 26a (quoting *Booker*, 543 U.S. at 258). The majority determined that "the remaining provisions of § 3583, and of the sentencing code, 18 U.S.C. §§ 3551-3586," could "function independently" of the two sentences of Section 3583(k) that required revocation of supervised release and reimprisonment for five years upon finding certain supervised-release violations. *Id.* at 27a-28a. But without analyzing whether those two sentences could themselves be enforced in a constitutional manner, the court declared them to be "unconstitutional and unenforceable." *Id.* at 27a-28a.

2. Judge Kelly dissented from the majority's invalidation of the second and third sentences of Section 3583(k), warning against "jump[ing] ahead of the Supreme Court when it has already spoken on this issue." Pet. App. 34a; see *id.* at 31a-34a.

Judge Kelly "disagree[d]" with the conclusion, underlying the majority's first rationale for its constitutional holding, that *Booker* "applies to revocation proceedings." Pet. App. 31a. He observed that respondent "was tried and found guilty beyond a reasonable doubt

of the original offense"; that "those jury-found facts supported the sentence imposed"; that *Booker* had "applied to that sentence"; and that respondent had been "instructed that supervised release would be part of that sentence and that there were certain restrictions he had to abide by lest his supervised release be revoked." *Ibid.* "That the full panoply of rights were guaranteed to [respondent] during his initial criminal proceeding," Judge Kelly explained, "does not mean that they attach once more during a revocation proceeding," which "is neither part of th[e] criminal prosecution nor is it a new criminal prosecution." *Id.* at 31a-32a; see *id.* at 31a (citing *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973)). Judge Kelly found the majority's view that *Booker* would apply to such a proceeding, even though *Apprendi* and *Alleyne* would not, to be "hard to understand * * * under current precedent." *Id.* at 32a.

Judge Kelly additionally observed that this Court "answered the [majority's] second objection to" Section 3583(k) by holding in *Johnson* that "revocation of supervised release is not 'punishment for the violation of the conditions of supervised release.'" Pet. App. 32a (citation omitted). He accordingly criticized the majority for "fail[ing] to take the Supreme Court at its word." *Ibid.* And he explained that "under the 'breach of trust' theory applicable to the revocation of supervised release," wherein "'the nature of the conduct leading to the revocation [can] be considered in measuring the extent of the breach of trust,'" Congress "can determine that the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation." *Id.* at 33a (quoting Sentencing Guidelines Ch. 7, Pt. A, intro. 3(b) (2016) (brackets in original)). He accordingly would have affirmed the district

court's reimprisonment of respondent for five years. *Id.* at 34a.

SUMMARY OF ARGUMENT

The court of appeals erred in striking down the provisions of Section 3583(k) that required the district court to revoke respondent's supervised release and order his reimprisonment. The jury-trial right, which is guaranteed in "all criminal prosecutions," U.S. Const. Amend. VI, did not apply to the proceedings below, which occurred long after respondent's criminal prosecution had ended and concerned sentence-implementation facts that did not exist when the criminal prosecution occurred. This Court has repeatedly countenanced analogous sentence-administration proceedings in which a defendant's conditional liberty may be revoked based on a judicial—or even executive—factual determination, without requiring a jury finding beyond a reasonable doubt. And even if such a finding were required, Section 3583(k) would not be "unconstitutional and unenforceable." Pet. App. 27a-28a.

I. This Court's decisions construing the jury-trial right draw a line between facts relevant to the imposition of a sentence, to which the right may apply, and those relevant to the administration of a sentence, to which the right does not apply. A "criminal prosecution" was historically understood to end when the sentence was imposed and final judgment was entered. Consistent with that understanding, this Court has recognized that the Sixth Amendment does not apply to parole-revocation proceedings, see *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972), probation-revocation proceedings, see *Gagnon* v. *Scarpelli*, 411 U.S. 778, 781 (1973), or proceedings concerning the accrual of credits that will shorten a term of imprisonment, see *Wolff* v.

McDonnell, 418 U.S. 539, 556-557 (1974). Although each of those proceedings implicates the defendant's liberty—through the possibility of new, renewed, or lengthened imprisonment—the Court has consistently held that previously convicted defendants have only limited due-process rights in such sentence-administration contexts. Those rights have not included the right to a jury finding beyond a reasonable doubt.

This Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny, likewise reflect the historical understanding of a "criminal prosecution" as the trial for a criminal offense culminating in the imposition of a sentence, not the implementation of a previously imposed sentence. Those decisions recognize that any fact, other than the fact of a prior conviction, that increases the sentencing range applicable when the judge *imposes* a sentence must be charged in an indictment and found beyond a reasonable doubt by the jury (or admitted in a plea). But this Court's precedents do not suggest that postjudgment facts—which do not even exist at the time of the indictment or sentencing—are subject to a similar requirement. The "animating principle" of the *Apprendi* rule "is the preservation of the jury's historic role as a bulwark between the State and the accused *at the trial for an alleged offense*," *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (emphasis added), and a postsentencing jury would be historically anomalous. The history of probation and parole illustrates that juries have traditionally played no part in determining facts about a defendant's compliance with the terms under which he has been allowed conditional liberty, even when such facts are prerequisites for imprisonment.

The district court was accordingly not required to convene a jury in order to revoke respondent's supervised release and order his reimprisonment based on his violation of his supervised-release conditions. Like parole—its direct precursor and close analogue—and probation, supervised release is a system of conditional liberty in which a defendant is subject to imprisonment for noncompliance with the requirements that the court has ordered. Nothing in logic, history, or precedent required the insertion of a jury into the court's supervisory determination that respondent, previously sentenced to a ten-year term of supervised release, violated the release conditions and should be reimprisoned for five years as required by Section 3583(k). Indeed, this Court in *Johnson* v. *United States*, 529 U.S. 694 (2000), appeared to view revocation of supervised release and reimprisonment based on judicial factfinding by a preponderance of the evidence to be a constitutionally unproblematic consequence of a defendant's original conviction. And until the decision below, every court of appeals that had addressed the question—including the Tenth Circuit itself—had recognized that the Sixth Amendment does not apply to the revocation of supervised release and resulting reimprisonment.

The majority below erred in concluding otherwise. Its view that a decision premised on the Sixth Amendment, *United States* v. *Booker*, 543 U.S. 220 (2005), applies here, even if the Sixth Amendment itself does not, is untenable. And its view that Section 3583(k) imposes penalties for a new criminal offense is at odds both with *Johnson*, which attributed revocation of supervised release to the original offense of conviction, and with its own recognition that a defendant's supervised release *can* be revoked based on a judicial factfinding of a

supervised-release violation that matches the definition of a crime. Congress was entitled to identify certain types of supervised-release violations following convictions of certain offenses—such as respondent's possession of child pornography while on supervised release for possessing child pornography—as particularly serious breaches of trust that require lengthy reimprisonment. In doing so, it did not create new "criminal prosecutions" subject to the Sixth Amendment.

II. The court of appeals compounded the errors in its constitutional analysis by ordering an inappropriate remedy. Even if the jury-trial right applied to supervised-release revocation proceedings, the court below had no sound basis for declaring the challenged provisions of Section 3583(k) facially unconstitutional and therefore "unenforceable." Pet. App. 26a, 28a. As this Court's previous decisions illustrate, the appropriate remedy for a violation of the right to have a jury find particular facts is to require a jury to find those facts. Nothing in Section 3583(k) precludes that tailored remedy, which would satisfy the constitutional entitlement perceived by the court below while still effectuating Congress's efforts to ensure suitable lengths of imprisonment for sex offenders who present heightened risks of recidivism and endanger children. Thus, in the event this Court declines to reverse the decision below on the merits, it should reverse on the separate ground that the challenged provisions of Section 3583(k) are enforceable if a jury is convened to find the required facts.

ARGUMENT

I. THE DISTRICT COURT'S ADMINISTRATION OF RESPONDENT'S PREVIOUSLY IMPOSED SENTENCE UNDER SECTION 3583(k) WAS CONSTITUTIONALLY VALID

Nothing in the Fifth or Sixth Amendments precluded the district court from relying on its factual findings by a preponderance of the evidence to apply 18 U.S.C. 3583(k) in administering the sentence it had previously imposed on respondent. That previously imposed sentence included a term of supervised release, during which respondent's liberty was conditioned on court-overseen compliance with explicit and specific requirements. In administering respondent's sentence, the court was not required to hold a jury trial as a prerequisite to determining that respondent had violated a particular supervised-release condition that required revocation and reimprisonment under Section 3583(k). Both judicial and historical precedent make clear that such a determination is part of the administration of a sentence—not a new "criminal prosecution" to which a jury-trial right might attach.

A. The Constitutional Right To A Jury Finding Beyond A Reasonable Doubt Does Not Apply To Postjudgment Revocation Of A Defendant's Conditional Liberty

The Sixth Amendment guarantees the right to a jury "[i]n all criminal prosecutions." U.S. Const. Amend. VI. In construing that guarantee and the "companion right" under the Fifth Amendment to have the jury find each element of a crime beyond a reasonable doubt, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000), this Court has distinguished between proceedings relevant

to the *imposition* of a sentence and proceedings relevant to the *administration* of a sentence. The Court has held that imposition of the sentence is part of a "criminal prosecution" under the Sixth Amendment, but has consistently recognized that administration of a sentence is not. Postjudgment proceedings involving the revocation of conditional liberty fall into the latter category—they are sentence-administration proceedings that do not trigger the jury-trial right.

1. Administering a sentence by revoking a defendant's conditional liberty is not part of a "criminal prosecution" that requires jury factfinding

The plain text of the Sixth Amendment, and this Court's precedents interpreting its protections, illustrate that the right to a jury finding beyond a reasonable doubt does not apply to facts concerning the implementation of the sentence. Such facts arise after the criminal prosecution has ended and do not expand the sentence beyond the boundaries of what the jury's verdict (or the defendant's plea) authorized.

a. The Sixth Amendment's application to "all criminal prosecutions," U.S. Const. Amend. VI, has long been understood as referring solely to the proceedings through which final judgment is entered on a charge, and not to postjudgment sentence-administration proceedings. Noah Webster's Founding-era dictionary, for example, defined "prosecution" as "[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment." 2 Noah Webster, *An American Dictionary of the English Language* (1828). And "Blackstone's usage" of the term "appears to have accorded with th[at] ordinary meaning." *Rothgery* v. *Gillespie Cnty.*,

554 U.S. 191, 221-222 (2008) (Thomas, J., dissenting); see *id.* at 219-222. Blackstone defined the "prosecution" of criminal offenders as "the manner of their formal accusation," 4 William Blackstone, *Commentaries on the Laws of England* 298 (1769) (4 Blackstone), which he distinguished from other phases of the criminal process, such as "execution" of the sentence, *id.* at 286.

In accord with the plain meaning of the term "criminal prosecution," this Court has repeatedly recognized that the Sixth Amendment does not require a jury finding beyond a reasonable doubt in a postjudgment proceeding involving only the implementation of a sentence that has already been imposed. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), for example, the Court held that the Sixth Amendment does not extend to a proceeding concerning the "revocation of parole," in which a defendant who has been serving part of his sentence out of prison, subject to conditions, may be reimprisoned for violating those conditions (with no credit for the time spent on parole). *Id.* at 480; see *id.* at 479-480. The Court viewed parole revocation as part of the "[s]upervision" of the sentence, explaining that parole—and thus its revocation —"arises after the end of the criminal prosecution, including imposition of sentence." *Id.* at 480.

Likewise, in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), the Court reached an identical conclusion with respect to a proceeding concerning the revocation of probation, in which a defendant whose sentence consisted of a term of conditional liberty was sent to prison for violating the conditions that were imposed. *Id.* at 779-781. The Court explained that "[p]robation revocation, like parole revocation, is not a stage of a criminal prosecution." *Id.* at 782. Additionally, in *Wolff* v. *McDonnell*, 418 U.S.

539 (1974), the Court recognized that "[p]rison disciplinary proceedings," such as the denial of good-time credit on a sentence already imposed, "are not part of a criminal prosecution," and that "the full panoply of rights due a defendant in such proceedings does not apply." *Id.* at 556.

b. The prospect that postjudgment facts may affect a defendant's liberty, through the enforcement of the terms of the defendant's sentence, does not in itself trigger any requirement that a jury find such facts beyond a reasonable doubt. The Court has recognized that a defendant whose parole is revoked "may face a potential of substantial imprisonment," *Morrissey*, 408 U.S. at 480; that there is a "loss of liberty entailed" in the revocation of probation, *Gagnon*, 411 U.S. at 781; and that the denial of good-time credit "can postpone the date of eligibility for parole and extend the maximum term to be served," *Wolff*, 418 U.S. at 561. Yet in each circumstance, the Court has explained that the potential deprivation of liberty is protected by tailored due process requirements, not the more categorical rights that the Sixth Amendment attaches to a formal "criminal prosecution." See *Morrissey*, 408 U.S. at 489; *Gagnon*, 411 U.S. at 782; *Wolff*, 418 U.S. at 561.

In *Morrissey*, for example, the Court explained that certain "minimum requirements of due process" apply to the revocation of parole, including (1) a preliminary hearing if the person is arrested, (2) "written notice of the claimed violations of parole," (3) disclosure of the evidence against the person, (4) the "opportunity to be heard in person and to present witnesses and documentary evidence," (5) "the right to confront and cross-examine adverse witnesses (unless the hearing officer

specifically finds good cause for not allowing confrontation)," (6) a "'neutral and detached'" hearing body, and (7) "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U.S. at 489. The Court adopted the same protections for probation revocation, along with the possibility of a right to counsel in some circumstances. *Gagnon*, 411 U.S. at 782, 789. And the Court has similarly held that prisoners contesting the revocation of good-time credits that would shorten their prison terms were entitled to certain procedural protections, but less than the "range of procedures suggested by *Morrissey*" for parole revocation, and far less than would be required in a "criminal prosecution." *Wolff*, 418 U.S. at 561.

In specifying the requirements for a parole-revocation hearing, the Court "emphasize[d] that there is no thought to equate" such a hearing "to a criminal prosecution in any sense." *Morrissey*, 408 U.S. at 489. And the Court stressed that any right to counsel in the context of a probation-revocation hearing arises not from the Sixth Amendment—which does not apply because probation revocation does not involve the "right of an accused to counsel in a criminal prosecution"—but rather from the "more limited due process right" applicable to a defendant who has already "been convicted of a crime." *Gagnon*, 411 U.S. at 789; cf. *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935) (holding that a federal probationer had a statutory right to a hearing before a judge, but observing that he may not "insist upon a trial in any strict or formal sense").

In none of the decisions did the Court suggest that a jury finding beyond a reasonable doubt would be required as a prerequisite to additional imprisonment for a defendant's violation of the terms of his conditional

liberty. To the contrary, the Court recognized that a "traditional parole board," or similar entity, could find the relevant facts. *Morrissey*, 408 U.S. at 489; see *Gagnon*, 411 U.S. at 781-782 (permitting revocation of probation based on findings by a state administrative agency); *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (stating that "there is no right to a jury trial" before revocation of probation).

2. The Sixth Amendment-based Apprendi rule applies only to the imposition of a sentence

In *Apprendi* v. *New Jersey*, *supra*, and a series of related decisions, this Court has clarified that the jury-trial right "is implicated whenever a judge seeks to impose a sentence" based on a mandatory sentencing range that is not "solely based on 'facts reflected in the jury verdict or admitted by the defendant'" (or the fact of a prior conviction). *United States* v. *Booker*, 543 U.S. 220, 232 (2005) (citation omitted). The Court has continued, however, to recognize that "indeterminate schemes" of sentencing that "involve judicial factfinding" by "a judge" or "a parole board" do not implicate the jury-trial right. *Blakely* v. *Washington*, 542 U.S. 296, 309 (2004); see *Cunningham* v. *California*, 549 U.S. 270, 276 (2007) (distinguishing State's prior "indeterminate sentence regime" that relied on parole from subsequent scheme that violated *Apprendi*); see also *United States* v. *Knights*, 534 U.S. 112, 120 (2001) (non-*Apprendi* case noting that "revocation of probation, and possible incarceration," occurs "in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt * * * do not apply").

In explaining the scope of the jury-trial right, *Apprendi* looked to the historical scope of "criminal proceedings," identifying "indictment," "trial by jury," and

"judgment by court" as the relevant stages. 530 U.S. at 478. The Court described the last of those stages—"judgment by court"—as "the stage approximating in modern terms the imposition of the sentence." *Id.* at 478 n.4 (citing 4 Blackstone 378). Subsequent cases have accordingly framed the *Apprendi* rule—that "[t]he Sixth Amendment reserves to juries the determination of any fact, other than the fact of a prior conviction, that increases a criminal defendant's" statutory sentencing range, *Southern Union Co.* v. *United States*, 567 U.S. 343, 346 (2012)—as one applicable to the "impos[ition]" of a sentence, rather than any subsequent proceedings, *Booker*, 543 U.S. at 232; see *Cunningham*, 549 U.S. at 274-275; *Blakely*, 542 U.S. at 303-304.

Nothing in the *Apprendi* rule suggests application of the jury-trial right to postjudgment facts that relate only to the administration of a previously imposed sentence. The "animating principle" of the *Apprendi* rule "is the preservation of the jury's historic role as a bulwark between the State and the accused *at the trial for an alleged offense*." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (emphasis added); see *Alleyne* v. *United States*, 570 U.S. 99, 114 (2013); *Apprendi*, 530 U.S. at 477. The Court has accordingly recognized that the facts a jury must find beyond a reasonable doubt are the same facts that must be alleged on "the face of the indictment" to ensure that the defendant receives adequate notice of the possible penalties for his crime. *Alleyne*, 570 U.S. at 113-114; see *United States* v. *Cotton*, 535 U.S. 625, 627 (2002); *Apprendi*, 530 U.S. at 476, 478. The Court has thus frequently looked to indictment-stage practices to determine the scope of the *Apprendi* rule. See

Alleyne, 570 U.S. at 109-111, 117 (plurality opinion); *Apprendi*, 530 U.S. at 480 (discussing necessity that "essential elements * * * be alleged in the indictment").

Facts that do not exist before the sentence is imposed, let alone at the time the defendant is charged, cannot be included in the indictment or be part of the criminal trial. Accordingly, neither *Apprendi* nor any of its progeny has applied its rule to such facts. Instead, each has required jury findings of facts relevant to the range of sentences the court may lawfully impose in the first instance. See, *e.g.*, *Alleyne*, 570 U.S. at 116 (imposition of statutory minimum sentence); *Southern Union*, 567 U.S. at 346 (imposition of "sentences of criminal fines"); *Cunningham*, 549 U.S. at 275 (imposition of enhanced sentence); *Booker*, 543 U.S. at 230-244 (imposition of sentence under mandatory sentencing guidelines); *Blakely*, 542 U.S. at 305 (same); *Apprendi*, 530 U.S. at 490 (imposition of sentence above statutory maximum).

Application of the Sixth Amendment to postjudgment sentence-administration issues would be especially difficult to square with the Court's decision in *Oregon* v. *Ice*, *supra*. In *Ice*, the Court recognized that the jury-trial right did not apply to facts bearing on decisions about whether sentences for different offenses should run concurrently or consecutively. See 555 U.S. at 164. The Court observed that all of its *Apprendi* "decisions involved sentencing for a discrete crime," as distinct from "administering multiple sentences" that are imposed "for multiple offenses different in character or committed at different times." *Id.* at 167-168. Even though the determination whether to run sentences concurrently or consecutively is inextricably intertwined with the imposition of those sentences, the Court did not

treat that determination as a part of the "criminal prosecution" for Sixth Amendment purposes. "Intruding *Apprendi*'s rule into" such determinations, the Court explained, "would cut the rule loose from its moorings." *Id.* at 171-172. Sentence-administration issues that arise only after the defendant has begun serving the sentence are even more attenuated from the criminal prosecution, and likewise cannot be treated as part of it.

3. Historical practice confirms that juries have no role in the revocation of conditional liberty

The Court's consistent distinction between imposition and administration of a sentence finds firm grounding in historical practices. As this Court has repeatedly explained, "the scope of the constitutional jury right must be informed by the historical role of the jury at common law." *Southern Union*, 567 U.S. at 353 (quoting *Ice*, 555 U.S. at 170); see, *e.g.*, *Blakely*, 542 U.S. at 301-302; *Apprendi*, 530 U.S. at 477-484. Where the "historical record demonstrates that the jury played no role in" a particular decision, the Court has declined to extend the jury-trial right beyond "the jury's traditional domain." *Ice*, 555 U.S. at 168. The historical record here demonstrates that the jury's traditional domain has not included facts relevant solely to the revocation of conditional liberty. Both of the principal forms of conditional liberty historically recognized at common law—parole and probation—could be revoked, leading to a defendant's imprisonment, without any jury findings beyond a reasonable doubt.

a. Parole traces its common-law roots to England's penal colonies in Australia, where officials had authority to grant prisoners a "conditional pardon" as early as 1790. 4 U.S. Dep't of Justice, *The Attorney General's Survey of Release Procedures: Parole* 11 (1939) (*Parole*

Survey). That authority evolved into the power to grant a "ticket-of-leave," which allowed a prisoner to earn conditional release for good behavior, but which could be revoked for misconduct. *Ibid.* In 1843, a similar program granted "'tickets of license'" to prisoners within England itself. *Id.* at 12-13. Ireland followed with a modified and "more successful" system of "conditional liberation," which required prisoners to satisfy training and employment requirements before release "upon certain conditions, the violation of which led to reincarceration." *Id.* at 13.

On this side of the Atlantic, States began adopting parole and related systems of indeterminate sentencing and conditional liberty in the nineteenth century. The first indeterminate sentencing law was New York's "good-time law," which the state legislature enacted in 1817. *Parole Survey* 15. The law provided for reductions in prisoners' terms of incarceration as a reward for good behavior, and "many States" adopted similar laws over the ensuing decades. *Ibid.* New York was also the site of the first parole system, which was adopted in 1876 and provided for released prisoners to remain "under * * * supervision" for a period of six months, "during which time their paroles could be revoked if they violated any of the conditions attached to their releases." *Id.* at 19-20. Other States soon adopted similar models, see *id.* at 20, and parole became "an integral part of the penological system" by the early twentieth century, *Morrissey*, 408 U.S. at 477.

In 1910, Congress enacted the Parole Act, ch. 387, 36 Stat. 819, which authorized the release of a federal prisoner who had served a portion of his sentence if a parole board found "a reasonable probability that" the

prisoner would "live and remain at liberty without violating the laws." § 3, 36 Stat. 819. Release on parole was subject to "such terms and conditions" as the parole board "shall prescribe." § 3, 36 Stat. 820. A parolee remained "under the control of the warden," who was authorized to "retak[e]" the parolee upon "reliable information that [he] has violated his parole." §§ 3, 4, 36 Stat. 820. The parole board could then "revoke" parole and require the prisoner to "serve the remainder of the sentence originally imposed," with no reduction for "the time the prisoner was out on parole." § 6, 36 Stat. 820; see *Anderson* v. *Corall*, 263 U.S. 193, 195-196 (1923) (describing revocation of parole by federal parole board). As with all of the predecessor systems, no jury was involved.

b. Probation, another form of conditional liberty, developed in a generally similar way. See 2 U.S. Dep't of Justice, *The Attorney General's Survey of Release Procedures: Probation* 1 (1939) (*Probation Survey*). "The concept of probation * * * evolved out of the [English] practice of judicial reprieve," which entailed "a temporary suspension of sentence to allow a defendant to appeal to the crown for a pardon." Howard Abadinsky, *Probation and Parole: Theory and Practice* 96 (9th ed. 2006) (emphasis omitted). Some early American courts relied on a version of that practice to justify "an indefinite suspension of sentence" where a defendant presented "mitigating circumstances," although no statutes formally authorized such a suspension. *Probation Survey* 6-7.

In 1878, the Massachusetts legislature passed "what may be considered the first probation statute." *Probation Survey* 22. The statute authorized the mayor of

Boston to appoint a police officer or other citizen to attend court sessions and "recommend to such courts the placing on probation of such persons as may reasonably be expected to be reformed without punishment." *Id.* at 22 n.75 (citation omitted). The statute directed the probation officer to "make reports as often at least as once in every 3 months" on the individuals released on probation. *Ibid.* (citation omitted). And the statute provided that any person on probation "may be rearrested" by a probation officer "without further warrant, and again brought before the court," which could then order imprisonment. *Ibid.* (citation omitted). Other States followed by enacting similar laws. *Id.* at 25-27.

In 1925, Congress passed the Probation Act, ch. 521, 43 Stat. 1259, which adopted an analogous probation system for federal courts. See *United States* v. *Murray*, 275 U.S. 347, 357-358 (1928) (elaborating on the enactment and purpose of the Probation Act). The statute gave district courts the power, in cases where the offense was not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best." 43 Stat. 1259. The statute directed probation officers to periodically report to the court on the defendant's compliance with the conditions of probation, § 2, 43 Stat. 1260, and authorized the court to "discharge the probationer from further supervision" or "extend the probation, as shall seem advisable," *ibid.* The statute also provided that "[a]t any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest," and that the court "may revoke the probation or the suspension of sentence, and may impose any

sentence which might originally have been imposed." *Ibid.* As this Court explained early on, the decision whether to revoke probation "rests in the court's discretion" and does not require any "formal procedure," such as a jury "trial upon charges." *Burns* v. *United States*, 287 U.S. 216, 221-222 (1932).

The probation statute today similarly empowers courts to impose probation on a limited class of offenders, 18 U.S.C. 3561; to set conditions for the probationer to meet while on release, 18 U.S.C. 3563; and to revoke probation if "the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation" in proceedings subject to Federal Rule of Criminal Procedure 32.1, 18 U.S.C. 3565(a). Neither the federal nor any state system of probation provides for a jury to find the facts justifying revocation beyond a reasonable doubt.

B. The Right To A Jury Finding Beyond A Reasonable Doubt Did Not Apply To The Revocation Of Respondent's Supervised Release

The text, judicial precedent, and history of the jury-trial right all demonstrate that the proceeding in which respondent's supervised release was revoked and he was reimprisoned under 18 U.S.C. 3583(k) was not part of a "criminal prosecution" to which the jury-trial right would attach. Like the revocation of parole or probation, or the denial of good-time credits, respondent's revocation was a sentence-administration function that occurred "after the end of the criminal prosecution, including imposition of sentence." *Morrissey*, 408 U.S. at 480. Respondent has not disputed that the imposition of the supervised-release portion of his sentence, including the conditions on his provisional liberty and the

prospect of reimprisonment for violating those conditions, was constitutionally authorized by the jury's findings at trial. Nothing in the Constitution required the district court to convene another jury in order to administer the explicit terms of its lawfully imposed sentence through its application of Section 3583(k).

1. This Court's recognition that the jury-trial right does not apply to parole-revocation proceedings, see *Morrissey*, 408 U.S. at 480, or probation-revocation proceedings, see *Gagnon*, 411 U.S. at 781, applies with full force to the supervised-release proceedings at issue here. Supervised release closely resembles parole and probation as a form of conditional liberty that is "part of the sentence" a defendant may receive for his initial conviction. 18 U.S.C. 3583(a); see, *e.g.*, *Morrissey*, 408 U.S. at 479-480. Like parole and probation, supervised release carries the possibility of revocation and imprisonment if a defendant violates the conditions on his liberty. See, *e.g.*, 18 U.S.C. 3583(e)(3), (g), and (k); *Gagnon*, 411 U.S. at 779-780; *Morrissey*, 408 U.S. at 480. And like parole and probation, supervised release is revoked (and imprisonment potentially imposed) based on facts that do not exist at the time of sentencing and that relate to the defendant's noncompliance with the sentence's terms—facts the jury could not have found in the first instance and that juries traditionally have not been asked to find.

Congress's adoption of supervised release to replace parole in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(2), 98 Stat. 1999, did not change any features of the scheme that would be relevant here. To the contrary, "[c]ourts have commented on the similarity" between parole, "which by

definition [i]s a release under supervision of a parole officer following service of some term of incarceration," and supervised release, which is the same type of release under supervision of a judicial officer. *Johnson* v. *United States*, 529 U.S. 694, 711 (2000). In *Johnson*, this Court itself relied on parole-system practices to inform its interpretation of the supervised-release statutes. See *id.* at 710-712.

The two systems do have important differences—for example, supervised release is "overseen by the sentencing court," rather than an executive agency. *Johnson*, 529 U.S. at 697. But in considering the constitutional requirements of a parole-revocation proceeding, the Court has viewed factfinding by judicial officers as an *additional* protection that may optionally be provided, see, *e.g.*, *Morrissey*, 408 U.S. at 489, not as a reason for imposing new constitutional procedural requirements, or for considering the proceeding to be part of a criminal prosecution, see, *e.g.*, *Black* v. *Romano*, 471 U.S. 606, 609, 611-612 (1985) (applying same due-process protections as in parole context when sentencing judge revokes probation). If anything, the fact that supervised-release revocation is ordinarily initiated by a judicial officer or the court itself, not by a prosecutor or other executive official, further underscores that it is not properly considered part of a criminal prosecution.

2. Requiring jury findings beyond a reasonable doubt for supervised-release revocations like respondent's would be just as doctrinally and practically unsound as requiring them for parole and probation revocations. In a supervised-release revocation proceeding, a defendant is no longer "the accused" at a "trial for an alleged offense." *Ice*, 555 U.S. at 168. The defendant has been found "guilty of a crime against the

people," either by trial or plea, and accordingly faces deprivation "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special" conditions of supervised release, *Morrissey*, 408 U.S. at 480, 483; see *Johnson*, 529 U.S. at 712 (describing supervised release as a form of "limited liberty").

As this Court has explained, the fact that an individual has been convicted of a crime and released into society only on a promise to comply with specified conditions justifies "extensive restrictions on the individual's liberty" that would not otherwise be permissible. *Morrissey*, 408 U.S. at 483. The Court, for example, has recognized that parolees challenging the reasonableness of searches have "severely diminished" Fourth Amendment rights "by virtue of their status alone." *Samson* v. *California*, 547 U.S. 843, 852 (2006); see *Knights*, 534 U.S. at 119 (same for probationers). Indeed, many of the standard conditions of supervised release, such as the requirements to provide a DNA sample and refrain from firearms possession, could create constitutional questions if imposed on members of society who have absolute rather than only "conditional" liberty. *Morrissey*, 408 U.S. at 483-484; see 18 U.S.C. 3583(d); 1 C.A. App. 31-32 (prohibiting respondent from viewing adult pornography, which is generally protected by the First Amendment). It is thus widely accepted that individuals in respondent's position are differently situated from those who can claim the full extent of the constitutional protections against a deprivation of their absolute liberty.

As with parole and probation revocations, moreover, jury findings in the context of supervised-release revo-

cation, while not impossible, would be highly burdensome and impractical. The court and the parties would have to convene a new jury to find the facts every time a probation officer alleges a supervised-release violation. That stark departure from settled practice would effectively create "bifurcated or trifurcated" trials that have no precedent and "make scant sense." *Ice*, 555 U.S. at 171-172. It would also change the "informal" character of revocation hearings, which this Court has repeatedly approved in the parole and probation contexts. *Morrissey*, 408 U.S. at 484; see *Black*, 471 U.S. at 613 (describing the "flexible, informal nature" of probation-revocation hearings).

3. Although *Johnson* did not directly present the question, the Court's opinion in that case strongly suggests that a jury finding beyond a reasonable doubt is not required before a court may revoke a defendant's supervised release and order reimprisonment. The court of appeals decision that the Court reviewed in *Johnson* had viewed revocation of supervised release as punishment for "new offenses" committed in violation of supervised-release conditions. 529 U.S. at 700 (citation omitted). This Court, however, disagreed with the court of appeals' reasoning on that point. See *id.* at 700-701. In so doing, this Court considered, and treated as constitutionally unproblematic, the use of judicial factfinding to trigger revocation of supervised release and reimprisonment.

The Court in *Johnson* "attribute[d] postrevocation penalties to the original conviction," observing that "construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release" would raise "serious constitutional questions." 529 U.S. at 700-701. The Court first observed that

"[a]lthough such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under the preponderance of the evidence standard, not by a jury beyond a reasonable doubt." *Id.* at 700 (citing 18 U.S.C. 3583(e)(3) (1988)). The Court also observed that "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense." *Ibid.* "Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties." *Ibid.*

The Court in *Johnson* thus perceived potential "constitutional questions" in allowing supervised-release violations to be found by a judge by a preponderance of the evidence *only* if revocation and reimprisonment were treated as criminal punishment distinct from the underlying conviction. 529 U.S. at 700. But attributing revocation and reimprisonment to "the original conviction" for which supervised release was imposed—a conviction that would itself be based on facts as to which the defendant would have a jury-trial right—"avoid[ed] the[] difficult[y]." *Id.* at 700-701. Although the decision in *Johnson* did not specifically reference the Sixth Amendment, the Court decided *Johnson* only a month before *Apprendi*, and just one Term after it had "foreshadowed" the *Apprendi* rule and construed a different federal statute to avoid it. *Apprendi*, 530 U.S. at 476; *Jones* v. *United States*, 526 U.S. 227, 239-252 & n.6 (1999).

The Court, moreover, supported its resolution of the potential constitutional difficulties identified in *John-*

son in part through a citation to a Second Circuit decision that had "not[ed] [the] absence of constitutional procedural protections in revocation proceedings." 529 U.S. at 700 (citing *United States* v. *Meeks*, 25 F.3d 1117, 1123 (1994)). The Second Circuit in that case had found "no right to trial by jury" in supervised-release revocation proceedings and explained that the "government need prove the alleged supervised-release violation only by a preponderance of the evidence, not beyond a reasonable doubt." *Meeks*, 25 F.3d at 1123. The Court in *Johnson* also included a "Cf." citation to *Gagnon*'s holding that "[p]robation revocation ... is not a stage of a criminal prosecution," suggesting that the Court viewed supervised-release revocation as similarly outside the scope of the Sixth Amendment's jury-trial right. 529 U.S. at 700 (quoting *Gagnon*, 411 U.S. at 782).

4. Consistent with *Johnson*—as well as *Gagnon* and *Morrissey*—courts of appeals addressing whether the jury-trial right recognized in *Apprendi* applies in supervised-release revocation proceedings have concluded that the "law is clear that once the original sentence has been imposed in a criminal case, further proceedings with respect to that sentence are not subject to Sixth Amendment protections." *United States* v. *Work*, 409 F.3d 484, 491 (1st Cir. 2005). Indeed, aside from the decision below, no court of appeals has concluded that the jury-trial right applies to supervised-release revocation and reimprisonment. See *ibid.*; *United States* v. *Carlton*, 442 F.3d 802, 806-810 (2d Cir. 2006); *United States* v. *Dees*, 467 F.3d 847, 854-855 (3d Cir. 2006), cert. denied, 552 U.S. 830 (2007); *United States* v. *Ward*, 770 F.3d 1090, 1096-1099 (4th Cir. 2014); *United States* v. *Hinson*, 429 F.3d 114, 117-119 (5th Cir. 2005), cert. denied, 547 U.S. 1083 (2006); *United States* v.

Johnson, 356 Fed. Appx. 785, 790-792 (6th Cir. 2009) (Moore, J., joined by O'Connor, J., sitting by designation); *United States* v. *McIntosh*, 630 F.3d 699, 703 (7th Cir.), cert. denied, 563 U.S. 951 (2011); *United States* v. *Gavilanes-Ocaranza*, 772 F.3d 624, 628-629 (9th Cir. 2014), cert. denied, 136 S. Ct. 225 (2015); *United States* v. *Cordova*, 461 F.3d 1184, 1186 (10th Cir. 2006); *United States* v. *Cunningham*, 607 F.3d 1264, 1266-1268 (11th Cir.) (per curiam), cert. denied, 562 U.S. 971 (2010).

For similar reasons, courts of appeals have broadly recognized that other provisions of the Sixth Amendment do not apply to supervised-release revocation proceedings because such proceedings are not part of the "criminal prosecutions" covered by the Sixth Amendment. See, *e.g.*, *United States* v. *Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005) (Confrontation Clause); *United States* v. *Aspinall*, 389 F.3d 332, 342 (2d Cir. 2004) (same); *United States* v. *Kirby*, 418 F.3d 621, 628 (6th Cir. 2005) (same); *United States* v. *Kelley*, 446 F.3d 688, 690-692 (7th Cir. 2006) (same); *United States* v. *Ray*, 530 F.3d 666, 668 (8th Cir. 2008) (same); *United States* v. *Hall*, 419 F.3d 980, 988-989 & n.4 (9th Cir.) (same), cert. denied, 546 U.S. 1080 (2005); *United States* v. *Reese*, 775 F.3d 1327, 1329 (11th Cir. 2015) (per curiam) (same); *United States* v. *Tippens*, 39 F.3d 88, 89 (5th Cir. 1994) (per curiam) (Speedy Trial Clause); *United States* v. *House*, 501 F.3d 928, 931 (8th Cir. 2007) (same); *Gavilanes-Ocaranza*, 772 F.3d at 628; *United States* v. *Boultinghouse*, 784 F.3d 1163, 1171 (7th Cir. 2015) (right to counsel); *United States* v. *Owen*, 854 F.3d 536, 541 (8th Cir. 2017) (same); *United States* v. *Spangle*, 626 F.3d 488, 494 (9th Cir. 2010) (same), cert. denied 565 U.S. 885 (2011).

Indeed, the Tenth Circuit itself recognized in *United States* v. *Henry*, 852 F.3d 1204, 1206 (2017) (Gorsuch, J.), that "the Confrontation Clause of the Sixth Amendment does not apply to supervised release revocation proceedings." *Id.* at 1206. No sound reason exists to take a different view with respect to the jury-trial right.

C. The Court Of Appeals Erred In Deeming Section 3583(k) Constitutionally Invalid

The district court's application of Section 3583(k) to respondent was constitutional. As the court of appeals recognized, and respondent does not dispute, the jury's conviction of respondent for violating 18 U.S.C. 2252(a)(4)(B) authorized a term of supervised release of five years to life. See 18 U.S.C. 3583(k); see also Pet. App. 27a (finding no constitutional infirmity with that portion of Section 3583(k)). The district court imposed a ten-year term of supervised release, during which respondent was entitled to remain outside of prison only so long as he complied with the explicit conditions of that release. Pet. App. 37a; see *Johnson*, 529 U.S. at 700. After respondent violated those conditions, the court, in its role as the "oversee[r]" of respondent's sentence, *Johnson*, 529 U.S. at 697, constitutionally applied Section 3583(k) to effectively modify that ten-year term of supervised release to five years of reimprisonment followed by five years of supervised release. The majority below erred in concluding that those sentence-administration proceedings were unconstitutional. See Pet. App. 31a-34a (Kelly, J., concurring in part and dissenting in part).

1. The majority below explicitly acknowledged that "[r]evocation of supervised release is not part of a criminal prosecution, so defendants accused of a violation of the conditions of supervised release have no right to a

jury determination of the facts constituting that violation." Pet. App. 17a; see *id.* at 19a n.1. Respondent likewise acknowledges that "revocation of supervised release may not directly contemplate a 'criminal prosecution' under the terms of the Sixth Amendment." Br. in Opp. 15. The majority below nevertheless reasoned (and respondent has suggested in this Court, see *id.* at 17-20) that this Court's decision in *United States* v. *Booker*, *supra*—which applied the *Apprendi* rule to the imposition of a sentence under the then-mandatory federal Sentencing Guidelines—prescribed relevant limitations that would "appl[y] to all sentencing proceedings, including the imposition of a subsequent term of imprisonment following revocation of supervised release." Pet. App. 19a. That reasoning is unsound.

As an initial matter, the majority's position that "the Sixth Amendment does not require particular procedures in a revocation hearing" but that revocation under Section 3583(k) nevertheless contravenes this Court's holding in *Booker*, Pet. App. 19a-20a n.1, is "hard to understand," *id.* at 32a (Kelly, J., concurring in part and dissenting in part). The holding of *Booker* does not exist apart from the Sixth Amendment; as the majority expressly recognized, "*Booker* itself relied on the Sixth Amendment." *Id.* at 20a n.1; see *Booker*, 543 U.S. at 226 ("The question presented * * * is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."). Accordingly, the majority's acknowledgment that "the Sixth Amendment's protections cannot be directly invoked" in the context of supervised-release revocation, Pet. App. 19a n.1—and respondent's similar acknowledgment in this Court, Br. in Opp. 15—should foreclose any application of *Booker* here.

In any event, the majority below erred in treating the proceedings at issue in this case as constitutionally indistinguishable from the proceedings at issue in *Booker*. The proceedings at issue in *Booker*—the initial imposition of a sentence following a criminal conviction, see 543 U.S. at 227-228—were unquestionably part of a "criminal prosecution" for Sixth Amendment purposes. Although "proceedings for violations of supervised release" are sometimes referred to as "sentencing" or "resentencing" proceedings, *Johnson*, 529 U.S. at 702, 708, such a proceeding "is not * * * a precise reenactment of the initial sentencing," *id.* at 712. Whatever nomenclature might be used to describe it, a supervised-release revocation proceeding remains a postjudgment proceeding aimed at determining the appropriate consequences for the defendant's violation of the conditions under which he has been allowed to serve part of his sentence outside of a prison. It is neither a replacement for, nor a continuation of, the original sentencing, and it therefore does not require jury factfinding. Cf. *Dillon* v. *United States*, 560 U.S. 817, 828 (2010) (holding that *Booker* does not apply to postjudgment sentence-modification proceedings under 18 U.S.C. 3582(c)(2), even though they are sometimes called resentencings).

The majority's contrary approach appears to be premised on the view that all proceedings that result in greater imprisonment are "sentencing proceedings" that require jury factfinding under *Booker*. Pet. App. 19a. But such a view cannot be squared with *Morrissey*, *Gagnon*, and *Wolff*, each of which involved proceedings that resulted in greater prison time but did not require jury findings under the Sixth Amendment. See pp. 25-27, *supra*. *Booker*, moreover, cited Section 3583 as a

component of federal sentencing law that remains "perfectly valid" notwithstanding the Court's holding that the mandatory Sentencing Guidelines violated the Sixth Amendment. 543 U.S. at 258.

The majority below similarly had no basis to view the five-year minimum period of reimprisonment for a supervised-release violation required by Section 3583(k) as an "increase[]" in the "minimum sentence to which [respondent] may be subjected." Pet. App. 20a; see *id.* at 21a. At respondent's initial sentencing, the court was authorized to impose a sentence of zero to ten years of imprisonment, 18 U.S.C. 2252(b)(2), to be followed by at least five years of supervised release, which could be revoked and converted to at least five years of reimprisonment if respondent violated his conditions of release in specified ways, 18 U.S.C. 3583(k). The district court's subsequent determination that respondent had violated the conditions of his supervised release in ways that trigger a minimum of five years of reimprisonment did not "increase[]" the sentence to which he was "exposed" in any way. Pet. App. 20a-21a. The court simply implemented the sentence that respondent received initially and was "exposed" to all along. *Id.* at 21a.

2. To the extent the majority below viewed a jury finding as necessary to trigger the statutorily required five-year minimum period of reimprisonment under 18 U.S.C. 3583(k), rather than the shorter zero-to-two-year term of reimprisonment that would have been authorized for a class C felony under 18 U.S.C. 3583(e)(3), that view was equally mistaken. Section 3583(k)'s requirement that a court revoke supervised release and reimprison a defendant for a minimum period does not alter the basic fact that a supervised-release revocation proceeding is not part of a "criminal prosecution." See

pp. 35-42, *supra*; *Ward*, 770 F.3d at 1097 (rejecting challenge to mandatory reimprisonment requirement in 18 U.S.C. 3583(g) (1988) because "supervised release revocation proceedings are not considered part of a criminal prosecution"); see also *United States* v. *Sperling*, 699 Fed. Appx. 636, 637 (9th Cir. 2017) (rejecting challenge to mandatory reimprisonment requirement in Section 3583(k) under plain-error review), petition for cert. pending, No. 17-8390 (filed Mar. 28, 2018).

The majority below accordingly did not dispute that a judicial finding by a preponderance of the evidence would suffice to authorize reimprisonment under Section 3583(e)(3). See, *e.g.*, Pet. App. 15a, 28a. And nothing in *Apprendi* or its progeny, including this Court's decision addressing statutory-minimum sentences in *Alleyne*, supports applying a more stringent standard to reimprisonment under Section 3583(k), simply because the latter requires a longer term of reimprisonment. See *id.* at 16a (acknowledging that "*Alleyne* * * * do[es] not apply to revocation proceedings"). The *Apprendi* rule would apply to a criminal offense with a sentencing range of zero to two years of imprisonment for the same reasons that it would apply to a criminal offense with a sentencing range of five years to life imprisonment. See *Alleyne*, 570 U.S. at 107-108. Thus, if findings of supervised-release violations were actually "element[s] of the offense" subject to the *Apprendi* rule, *id.* at 107-108, then a jury finding beyond a reasonable doubt would be necessary irrespective of the particular range of imprisonment prescribed. The majority's unwillingness to follow its premise to that logical conclusion suggests that the premise itself is flawed. See Pet. App. 32a (Kelly, J., concurring in part and dissenting in part).

3. The majority below likewise erred in attaching constitutional significance to the fact that Section 3583(k)'s application is triggered by a supervised-release violation that corresponds to one of several listed criminal offenses. See Pet. App. 22a-23a. Contrary to the majority's view, that aspect of the statute does not convert a revocation proceeding under Section 3583(k) into a new criminal prosecution that would require convening a jury.

As the dissenting judge below recognized, this Court "has already spoken on this issue." Pet. App. 34a (Kelly, J., concurring in part and dissenting in part). In *Johnson*, the Court recognized that "[w]here the acts of violation [of supervised-release conditions] are criminal in their own right, they may be the basis for separate prosecution." 529 U.S. at 700. In such a separate prosecution, which would provide the predicate for a separate criminal punishment, the *Apprendi* rule would of course apply. But in the context of a supervised-release revocation, this Court construed the consequences of the defendant's violation as "part of the penalty for the initial offense," not a new one. *Ibid.*

The possibility of *independent* prosecution and punishment does not suggest that the district court's supervision of *preexisting* punishment is itself a criminal prosecution. It would make little sense for a judicial finding to allow for revocation of supervised release and reimprisonment only when the judge-found conduct is *not* serious enough to match the definition of a criminal offense. The Constitution cannot reasonably be construed to permit revocation and reimprisonment based on a judicial finding of (for example) failure to attend

mandatory counseling, but to forbid revocation and reimprisonment based on a judicial finding of (for example) sexual abuse of a child.

The majority below recognized as much. It acknowledged that a judicial finding that a defendant "commit[ted] a[] crime" can provide the basis for revocation of supervised release and reimprisonment under Section 3583(e)(3). Pet. App. 22a. It believed, however, that a different rule applies to revocation of supervised release and reimprisonment under Section 3583(k). In its view, Section 3583(k) impermissibly punishes new criminal conduct because it does not apply to all supervised-release violations that correspond to criminal offenses (as Section 3583(e)(3) does), but instead applies only to supervised-release violations that correspond to particular listed criminal offenses. See *id.* at 23a. That reasoning is flawed.

The fact that Section 3583(k) assigns higher penalties to particularly serious violations does not "transform[]" the revocation proceeding into a new criminal prosecution." Pet. App. 24a. Nothing requires that every possible supervised-release violation result in reimprisonment for the exact same length of time. Even under Section 3583(e)(3), the sanctions that may be ordered are indeterminate and will ordinarily turn in part on factors such as the nature of the violation and its relationship to the original offense of conviction. Indeed, the Sentencing Guidelines, which the district court is required to consider when imposing a sanction under Section 3583(e)(3), require such an analysis in every case, irrespective of whether Section 3583(k) applies. See Sentencing Guidelines § 7B1.1; see also 18 U.S.C. 3583(e), 3553(a)(4)(B) (requiring consideration of the Guidelines).

It makes no difference that Congress itself prescribed the heightened penalties for the violations listed in Section 3583(k), rather than leaving it to the district court and the Sentencing Commission to account for the nature and severity of the violation. Increased statutory terms of reimprisonment for certain types of conditional-release violations are a common feature of state parole or other post-release supervision.[4] As the dissenting judge below recognized, Congress "can determine that

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[4] See Ark. Code Ann. § 16-93-715(a)(1) (Supp. 2017) (setting different terms of reimprisonment for violation of "technical conditions" and "serious conditions"); Colo. Rev. Stat. § 17-2-103(11)(b) (2017) (authorizing different punishments for violations involving commission of a crime and those that do not); Haw. Rev. Stat. Ann. § 353-66(e) (LexisNexis 2018) (limiting postrevocation confinement to six months for certain categories of violations); Iowa Code Ann. §§ 908.10, 908.10A (West Supp. 2018) (providing for mandatory revocation when a parolee is convicted of a felony or aggravated misdemeanor); Kan. Stat. Ann. § 75-5217(b), (c), and (d) (1997) (limiting length of reincarceration where the violation did not involve a new criminal conviction); La. Rev. Stat. Ann. § 15:574.9(H)(1) and (2) (Supp. 2018) (lower penalty for "technical violations"); Md. Code Ann. Corr. Servs. § 7-401(d) (LexisNexis Supp. 2018) (specifying lower penalty for "technical violation[s]"); N.Y. Exec. Law § 259-i(3)(e)(x) (McKinney 2018) (authorizing period of reincarceration longer than five years for certain sex offenses); N.C. Gen. Stat. §§ 15A-1368.3(c)(1), 15A-1368.4(b) (2017) (limiting postrevocation confinement to three months for violations other than committing a new crime or absconding); 61 Pa. Cons. Stat. Ann. § 6138(a), (c), (d), and (e) (West Supp. 2018) (limiting postrevocation confinement to six months for most types of technical violations); W. Va. Code Ann. §§ 62-12-18, 62-12-19(a), (b), and (c) (LexisNexis 2014) (authorizing higher penalties for new criminal conduct other than a minor traffic offense or simple possession of a controlled substance and requiring mandatory revocation with no further parole for certain serious criminal offenses).

the commission of certain crimes constitutes a more serious breach of trust warranting a longer term of revocation" of supervised release. Pet. App. 33a. Congress could, for example, make a judgment that a particular minimum term of reimprisonment is necessary for a sex offender like respondent who commits a further sex offense while on supervised release, in light of "evidence that recidivism rates among sex offenders are higher than the average for other types of criminals" and the "public safety concerns" posed by such offenders. *United States* v. *Kebodeaux*, 570 U.S. 387, 395 (2013). Or it could conclude more generally that a defendant who has been placed on supervised release for an offense and "again commits a similar offense" has shown that he is "more likely to continue on that path" and that he "has little respect" for the court. *United States* v. *Simtob*, 485 F.3d 1058, 1063 (9th Cir. 2007). Neither conclusion would suggest that Congress is in fact punishing the defendant for a new crime altogether, such that the proceedings should be treated as a "criminal prosecution" under the Sixth Amendment.

II. AT A MINIMUM, 18 U.S.C. 3583(k) IS NOT FACIALLY UNCONSTITUTIONAL

The court of appeals erred not only in its constitutional analysis but also in the remedy it ordered. If this Court reverses the decision below on the merits, as it should for the reasons above, the Court need not address any question of remedy. But if this Court concludes that mandatory revocation and reimprisonment under Section 3583(k) is unconstitutional in the absence of a jury finding beyond a reasonable doubt, the decision below would still require reversal, because the court of appeals improperly declared Section 3583(k)'s requirements "unenforceable." Pet. App. 28a.

As the court of appeals recognized, a court that has found part of a federal statute unconstitutional "must 'refrain from invalidating more of the statute than is necessary.'" Pet. App. 26a (quoting *Booker*, 543 U.S. at 258). All that would be "necessary" here, if the court of appeals' view of the Constitution were correct, would be to require a jury finding beyond a reasonable doubt as a prerequisite to enforcement of any problematic portions of Section 3583(k). The remedy for a deprivation of the jury-trial right is the provision of a jury trial. Although such a requirement would present substantial practical difficulties, see pp. 38-39, *supra*, it is more consistent with Congress's design than complete invalidation. See, *e.g.*, *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

This Court's approach in previous *Apprendi* cases is instructive. In *Southern Union*, for example, the Court concluded that facts justifying the imposition of particular criminal fines must be found by a jury beyond a reasonable doubt. 567 U.S. at 360. The Court did not, however, find the statute at issue unenforceable. The Court instead held "that the rule of *Apprendi* applies to the imposition of criminal fines" and remanded for further proceedings consistent with its opinion. *Ibid.* Likewise, in *Cunningham*, the Court suggested that "a separate sentencing proceeding" involving a jury would suffice to cure the *Apprendi* violation. 549 U.S. at 294. If the majority below was correct about the scope of the jury-trial right, it should have followed a similar course and allowed continued enforcement of the statutory provisions that Congress enacted in a way that complied with the majority's view of the Constitution.

Nothing in the text of Section 3583(k) precludes such a remedy. Section 3583(k) requires a court to "revoke

the term of supervised release and require the defendant to serve a term of imprisonment under" Section 3583(e)(3) when the defendant has engaged in certain conduct. 18 U.S.C. 3583(k). Section 3583(e)(3), in turn, authorizes revocation and reimprisonment based on a judicial finding "by a preponderance of the evidence," in accordance with the Federal Rule of Criminal Procedure 32.1. 18 U.S.C. 3583(e)(3); see *Johnson*, 529 U.S. at 700. Section 3583 thus authorizes, as a statutory matter, revocation of supervised release and reimprisonment under Section 3583(k) based on a judicial finding by a preponderance of the evidence. But the statutory procedures do not preclude the application of stricter constitutional procedures, if they are necessary.

A constitutional requirement of a jury finding beyond a reasonable doubt is not incompatible with the statutory requirement of a finding by a judge by a preponderance of the evidence; it is possible to satisfy both requirements in parallel. Thus, if this Court were to conclude that the jury-trial right does apply in the revocation context, the appropriate remedy would be to permit enforcement of Section 3583(k) so long as the statutory procedures are satisfied and a jury makes any required findings beyond a reasonable doubt. That approach would be consistent with any constitutional limitations while still respecting Congress's judgment that public safety requires sex offenders like respondent to serve substantial terms of reimprisonment for particularly problematic violations of the conditions of their supervised release.

As noted above, p. 11, *supra*, Congress enacted the portions of Section 3583(k) at issue here in the Adam Walsh Act, which Congress adopted "to protect the public from sex offenders and offenders against children."

§ 102, 120 Stat. 590. This Court has itself observed that sex offenders pose serious "public safety concerns" in light of their elevated rates of recidivism, *Kebodeaux*, 570 U.S. at 395—presenting a "risk" that "is 'frightening and high,'" *Smith* v. *Doe*, 538 U.S. 84, 93 (2003) (citation omitted); see *United States* v. *Williams*, 553 U.S. 285, 307 (2008) (noting the "threat" of "[c]hild pornography," which "harms and debases the most defenseless of our citizens"). Congress has "long kept track of former federal prisoners through probation, parole, and supervised release in part to prevent further crimes thereby protecting the public against the risk of recidivism." *Kebodeaux*, 570 U.S. at 397. Section 3583(k) serves a particularly important public-safety interest by authorizing extended supervision of sex offenders and providing substantial penalties for those who recidivate by committing additional sexual offenses. Even if this Court were to conclude that additional constitutional procedures are required to enforce Section 3583(k), it should not preclude its enforcement altogether.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

18 U.S.C. 3583 (2012 & Supp. V 2017) provides:

Inclusion of a term of supervised release after imprisonment

(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the fac-

tors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of

release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4).[1] The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

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[1] See References in Text note below.

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) MODIFICATION OF CONDITIONS OR REVOCATION. —The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised

release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) MANDATORY REVOCATION FOR POSSESSION OF CONTROLLED SUBSTANCE OR FIREARM OR FOR REFUSAL TO COMPLY WITH DRUG TESTING.—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised

release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) DELAYED REVOCATION.—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a

warrant or summons has been issued on the basis of an allegation of such a violation.

(j) SUPERVISED RELEASE TERMS FOR TERRORISM PREDICATES.—Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.